Rq. 76-617 (1)
2398

DAVID S. STALLARD
ATTORNEY AT LAW
2715 CAREW TOWER
CINCINNATI, OHIO 45202
(513) 241-2324

RECEIVED
SEP 16 1976
ATTORNEY GENERALS OFFICE

September 15, 1976

RECEIVED
SEP 17 1976
ENVIRONMENTAL LAW DIVISION

Robert Stephens, Esquire
Attorney General
Commonwealth of Kentucky
Capital Building
Frankfort, Kentucky 40601

Re: Request for Opinion

Dear Sir:

The Department of Fish & Wildlife Resources, through its conservation officers at Crittenden, Kentucky and Mr. William Bell, Director Conservation Education, desires to adopt and strictly enforce regulations concerning the use of its shooting ranges at the Curtis Gates Lloyd Wildlife Area at Crittenden, Kentucky. The Department has asked the aid of interested members of the public in promoting safety in connection with the use of the ranges.

It is contemplated that an Association of Shooters (a shooting club) will be organized as a non-profit corporation and that it will administer a safety course which must be passed by any person, Association member or not, prior to use of the range by the person. The course will be presented with the aid of the Association and of the Department of Fish and Wildlife Resources.

Questions have arisen as to the power and authority of the Department to adopt range use rules and regulations, and to enforce such.

I find pertinent statutory provisions but none exactly on point. For example, KRS 150.021 gives the Department the power to enforce laws and regulations "adopted under the chapter relating to wildlife and shall exercise all powers necessarily incident thereto".

KRS 150.024 provides that the Department has the right to acquire property as necessary to carry out the purpose of the chapter.

KRS 150.025(e) provides that as to game and fish, the Department has the power to make any other regulations

Rq. 76-617 (2)

reasonably necessary to implement or carry out purposes of the chapter.

KRS 150.090 provides that conservation and peace officers shall enforce the provisions of the chapter.

KRS 150.015 provides that the purpose of the Act establishing the Department is to promote the general welfare of the Commonwealth.

KRS 13.082 provides that the Department has the power to adopt regulations consistent with Departmental functions and duties.

With this in mind, the following questions arise as to which your opinion is requested.

1) Does the Department of Fish and Wildlife Resources have the power and authority to adopt and enforce regulations governing all use of the shooting ranges at the Curtis Gates Lloyd Wildlife Area?

2) Can the Department of Fish and Wildlife Resources require all persons to pass a safety course prior to using the ranges?

3) Can the Department of Fish and Wildlife Resources prescribe the content of the safety course itself, and can it utilize the aid of a non-profit corporation in administering the course?

4) If the Department of Fish and Wildlife Resources has authority to adopt and enforce regulations, including a safety course requirement, regarding use of the shooting range, are these regulations enforceable by the Kentucky State Police as well?

5) Can the Department, under KRS 13.082 or any other authority, require a person to be a member of a non-profit corporation as a pre-requisite to using the shooting ranges at Curtis Gates Lloyd Wildlife Area, Crittenden, Kentucky? If not, why?

I have discussed this matter generally with Mr. Short (56403594) of your office.

Very truly yours,

David S. Stallard

David S. Stallard
Member, Kentucky Bar Assoc.

DSS:dm
cc: Mr. Paul Gaines, Esquire
Mr. Tom Donnelly
Mr. William Bell
Mr. Dale Duley

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
FRANKFORT

ROBERT F. STEPHENS
ATTORNEY GENERAL

DIVISION OF NATURAL RESOURCES
AND ENVIRONMENTAL LAW

October 12, 1976

Mr. David S. Stallard
Attorney at Law
2715 Carew Tower
Cincinnati, Ohio 45202

OAG 76 617

Dear Mr. Stallard:

This is in response to your letter of September 15, 1976, in which you asked five questions:

Question No. 1:

"Does the Department of Fish and Wildlife Resources have the power and authority to adopt and enforce regulations governing all use of the shooting ranges at the Curtis Gates Lloyd Wildlife Area?"

The Department of Fish and Wildlife Resources (hereinafter known as the Department) has the authority to make regulations as to game and fish, KRS 150.025.

The Department has the authority to make regulations that are reasonably necessary to implement or carry out the purposes of Chapter 150 "Fish and Wildlife Resources," KRS 150.025(2)(g).

The declared purpose and the policy of Chapter 150 is to protect and conserve the wildlife of this Commonwealth so as to insure a permanent and continued supply of the wildlife resources for the purpose of furnishing sport and recreation. It is further the declared policy and purpose of Chapter 150 that an adequate and feasible system be installed to accomplish the aforesaid purposes. Also, all the provisions of Chapter 150 shall be liberally construed in such a manner as most effectually to carry out its purposes and intent, KRS 150.015.

OAG 76-617 (2)

In Commonwealth v Masden, 295 Ky. 861, 175 S.W.2d 1004, 1006 (1944) the Court recognized the universal rule that a state, in the exercise of its police power has the authority to make regulations necessary to protect and conserve game within its jurisdiction.

In an unpublished Attorney General's opinion it was stated that the department has the authority to promulgate regulations governing the size and type of any device used for taking wild game, OAG 67-393.

Furthermore, in another unpublished Attorney General's Opinion, it was stated that the department was an agency of the Commonwealth with power of eminent domain to acquire land deemed necessary to protect or conserve wildlife, and specifically to establish and maintain public shooting, OAG 66-308.

Therefore, it is the opinion of this office that the Department has the authority to adopt regulations governing the use of shooting ranges at all wildlife areas in the Commonwealth, and has the authority to enforce those regulations, KRS 150.021(1). However, these regulations must be uniform in that they apply to every wildlife area in the state where shooting takes place; unless Curtis Gates Lloyd Wildlife Area is in a class by itself, no regulations may be adopted specifically for that area.

Question No. 2:

"Can the Department of Fish and Wildlife Resources require all persons to pass a safety course prior to using the ranges?"

The Department can require all persons to pass a safety course prior to using the ranges as part of its police power in promoting the general welfare of the Commonwealth, KRS 150.015, KRS 150.021(1).

Question No. 3:

"Can the Department of Fish and Wildlife Resources prescribe the content of the safety course itself,

OAG 76-617 (3)

and can it utilize the aid of a non-profit corporation in administering the course?"

The Department can prescribe the content of the safety course since it can adopt regulations that require all persons to pass a safety course prior to using the ranges. Also, it can certify a non-profit corporation to administer the course; but it cannot, by its regulations, provide that this non-profit corporation has the exclusive right to administer the course.

Question No. 4:

"If the Department of Fish and Wildlife Resources has the authority to adopt and enforce regulations, including a safety course requirement, regarding use of the shooting range, are those regulations enforceable by the Kentucky State Police as well?"

The Kentucky State Police has broad powers to enforce all criminal laws. The statutes make it the duty of every officer of the Kentucky State Police to detect and prevent crime, and maintain law and order throughout the state. To this end, each officer of the Kentucky State Police is individually vested with the powers of a peace officer, KRS 16.060; OAG 65-762. The word "officer" means any member of the Kentucky State Police who possesses the power of a peace officer, KRS 16.010(4).

In addition, the statute imposes the duty on all peace officers and their deputies to enforce the laws and regulations relating to fish and wildlife as well as on conservation officers, KRS 150.090.

Question No. 5:

"Can the Department, under KRS 13.082, or any other authority, require a person to be a member of a non-profit corporation as a pre-requisite to using the shooting ranges at Curtis Gates Lloyd Wildlife Area, Crittenden, Kentucky? If not, why?"

OAG 76-617 (4)

The Department, as indicated above, can prescribe the content of the safety course. It can require a person to pass the safety course as administered by any group or organization accredited by the Department. However, it cannot require a person to be a member of a non-profit corporation as a pre-requisite to using the shooting ranges at Curtis Gates Lloyd Wildlife Area. If the Department required a person to be a member of the non-profit corporation, this would be an unlawful endorsement of this non-profit corporation to the exclusion of other private corporations, commercial or non-profit, and would be illegal and in violation of the Kentucky Constitution. Moreover, there seems to be no basis for such a classification, and such a requirement will be unconstitutional because it would violate the Constitution of the Commonwealth of Kentucky, Sections 59 and 60.

Sincerely yours,

ROBERT F. STEPHENS
ATTORNEY GENERAL

David Short

BY: David C. Short
Assistant Attorney General
-Director

David D. Beals

BY: David D. Beals
Assistant Attorney General

Bill Davis

BY: Bill Davis
Legal Intern (RCA 2.540)

Division of Natural Resources &
Environmental Law

DCS/DDB/BD:gac
cc:
Arnold L. Mitchell, Commissioner
Department of Fish and Wildlife Resources

WHAS 11

2793

Rq. 83-22

RECEIVED
Oct 29 1 44 PM '82
ATTORNEY GENERAL'S
OFFICE

October 27, 1982

Hon. Steven Beshear
Attorney General
Commonwealth of Kentucky

Mr. Beshear,

This is to request an opinion, or opinions, from your office regarding House Bill 397, passed by the Kentucky General Assembly in March 1982 and signed into law by the governor April 2, 1982.

The purpose of the law was to establish a schedule for auto dealer license suspension and revocation for convictions involving odometer tampering; it would also establish a $5,000. fine for dealers who fraudulently alter odometers or speedometers.

My questions are:

Since all odometer cases have been handled as civil matters in court, and since HB 397 specifically refers to "convictions," (which implies a criminal conviction), does the law apply to any cases that have been disposed of so far?

I am unable to find any state law which makes odometer tampering a criminal offense; therefore, does this law apply to federal convictions; and, is a $5,000. fine for a misdemeanor offense allowable under the Kentucky Penal Code?

Finally, is the law constitutional? One provision of the law attempts to make it "retroactive to cases occuring since July 1, 1976." Does this make the law an unconstitutional "Ex Post Facto" Law?

Thank you for your consideration.

Sincerely,

John Bowman

John Bowman,
WHAS-TV News

WHAS Television 11
Post Office Box 1084
Louisville, Kentucky 40201
502/582 7840
An Equal Opportunity Employer

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

CAPITOL BUILDING
FRANKFORT 40601

January 19, 1983

OAG83 22

Mr. John Bowman
WHAS-TV NEWS
P. O. Box 1084
Louisville, Kentucky 40201

Dear Mr. Bowman:

This is in response to your letter of October 27, 1982, in which you stated the following:

> This is to request an opinion, or opinions, from your office regarding House Bill 397, passed by the Kentucky General Assembly in March 1982 and signed into law by the governor April 2, 1982.
>
> The purpose of the law was to establish a schedule for auto dealer license suspension and revocation for convictions involving odometer tampering; it would also establish a $5,000. fine for dealers who fraudulently alter odometers or speedometers.
>
> My questions are:
>
> Since all odometer cases have been handled as civil matters in court, and since HB 397 specifically refers to "convictions," (which implies a criminal conviction), does the law apply to any cases that have been disposed of so far?
>
> I am unable to find any state law which makes odometer tampering a criminal offense; therefore, does this law apply to federal

convictions; and, is a $5,000. fine for a misdemeanor offense allowable under the Kentucky Penal Code?

Finally, is the law constitutional? One provision of the law attempts to make it "retroactive to cases occuring since July 1, 1976." Does this make the law an unconstitutional "Ex Post Facto" Law?

It will be necessary to note from the outset that KRS 190.270 was enacted by the 1976 Acts, Chapter 246, House Bill 322, Sections 2 to 4. Also, House Bill 397, Section 1, only amended KRS 190.270 by adding subsection (4). KRS 190.270 now reads as follows:

(1) It is unlawful for any person to advertise for sale, to sell, to use, or to install or to have installed, any device which causes an odometer to register any mileage other than the true mileage driven. For purposes of this section, the true mileage driven is that mileage the vehicle has been driven as registered by the odometer within the manufacturer's designed tolerance.

(2) It is unlawful for any person or his agent to disconnect, reset, or alter the odometer of any motor vehicle with the intent to change the number of miles indicated thereon.

(3) It is unlawful for any person with the intent to defraud to operate a motor vehicle on any street or highway knowing that the odometer of such vehicle is disconnected or nonfunctional.

(4) The department shall establish the following suspension and revocation schedule for dealer and manufacturer violations:

(a) First court conviction -- probation period of one (1) year;

(b) Second and subsequent court convictions -- thirty (30) day suspension per conviction; and

(c) Eight court convictions -- revocation of dealer's license to operate. For the purpose of suspension or revocation, if a party is convicted of multiple offenses by the court in a single appearance, said convictions shall be construed by the department as one (1) offense. The revocation and suspension schedule shall be retroactive to offenses committed as of July 1, 1976, unless a dealer or manufacturer has served a suspension or revocation through previous action of the department.

The liability for violation of KRS 190.270 is found in KRS 190.310 and 190.990(4). KRS 190.310 states:

(1) Any person who, with intent to defraud, violates any requirement imposed under KRS 190.270 to 190.320 shall be liable to the transferee in an amount equal to the sum of:

(a) Three times the amount of actual damages sustained or fifteen hundred dollars ($1,500), whichever is the greater; and

(b) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

(2) An action to enforce any liability created under subsection (1) of this section,

> may be brought in a circuit court of a county in which the purchaser of the motor vehicle resides.

KRS 190.990(4) states: "Any person who willfully violates KRS 190.270 to 190.320 shall be subject to a penalty of five thousand dollars ($5,000) per violation, which may be recovered on behalf of the Commonwealth by the attorney general."

Additionally, it will be worth examining from the outset a few cases to assist in understanding the meaning of ex post facto law. It has been recognized in virtually all United States Supreme Court cases to consider the point that only laws of a criminal nature can amount to ex post facto laws within the meaning of Article I, Section 9, Clause 3 and Article I, Section 10, Clause 1 of the United States Constitution which prohibit such enactments. The following cases contain express statements to this effect: Calder v. Bull, 3 U.S. 386, 1 L.Ed. 648 (1798); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 31 S.Ct. 171, 55 L.Ed. 137 (1911); Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954), rehearing denied, 348 U.S. 852, 75 S.Ct. 17, 99 L.Ed. 671 (1954). In Calder v. Bull, supra, a landmark case, Justice Chase noted that if the term ex post facto law were to be construed to include and to prohibit the enacting of any law after a fact, it would greatly restrict the power of the federal and state legislatures. In Galvan v. Press, supra, it was noted that it would be unjustifiable for the Supreme Court to overturn a view so deeply rooted and so consistently adhered to as the view that the ex post facto clause of the United States Constitution is applicable only to prosecutions of crime.

Moreover, a number of United States Supreme Court cases contain general pronouncements indicating that laws imposing certain types of alleged punishments lack the criminal character necessary to make them ex post facto laws violative of the United States Constitution. For example, it was acknowledged in Kentucky Union Co. v. Kentucky, supra, that laws of a retroactive nature imposing taxes or providing remedies for their assessment and collection are not forbidden as ex post facto laws by the Federal Constitution, since the

Constitution's ban on ex post facto laws has reference to criminal punishments and does not encompass retrospective enactments of a different character.

And, the Kentucky Supreme Court has stated that the ex post facto prohibitions of the Kentucky and United States Constitutions apply only to criminal matters. Nicholson v. Judicial Retirement and Removal Commission, Ky., 562 S.W.2d 306 (1978), appeal after remand, Ky., 573 S.W.2d 642 (1978).

Turning our attention to your questions, it is our opinion that the revocation and suspension schedule outlined in KRS 190.270(4) applies to offenses committed as of July 1, 1976, but does not apply to cases that have already been disposed of so far. Further, it is our opinion that since KRS 190.260 et seq. is very similar to 15 U.S.C. §1981 et seq., KRS 190.270(4) does apply to federal convictions.

As to whether a $5,000 fine for a misdemeanor offense is allowed under the Kentucky Penal Code, KRS 534.040(2) and (3) state:

> (2) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any offense other than a felony may be sentenced to pay a fine in an amount not to exceed:
>
> (a) For a Class A misdemeanor, $500; or
>
> (b) For a Class B misdemeanor, $250; or
>
> (c) For a violation, $250.
>
> (3) This section does not apply to a corporation. (Emphasis added.)

And, KRS 534.050 states:

> (1) For an offense defined in this code a corporation convicted of an offense

may be sentenced to pay a fine in an amount not to exceed:

(a) For a felony of any class, $20,000; or

(b) For a Class A misdemeanor, $10,000; or

(c) For a Class B misdemeanor, $5,000; or

(d) For a violation, $500; or

(e) Double the amount of the defendant's gain from commission of the offense, whichever is the greater.

(2) For an offense defined outside this code for which no special corporate fine is specified, a corporation convicted of an offense may be sentenced to pay a fine in an amount not to exceed:

(a) $20,000, if the offense when committed by an individual has an authorized term of imprisonment in the penitentiary; or

(b) $10,000, if the offense when committed by an individual has an authorized term of imprisonment of not less than ninety (90) days nor more than twelve (12) months; or

(c) $5,000, if the offense when committed by an individual has an authorized term of imprisonment of less than ninety (90) days; or

(d) $500, if the offense when committed by an individual has no authorized term of imprisonment; or

83-22

(e) Double the amount of the defendant's gain from commission of the offense, whichever is the greater.

(3) For an offense defined outside this code for which a special corporate fine is specified, a corporation convicted of the offense may be sentenced to pay a fine in the amount specified in the law that defines the offense.

Thus, it is our opinion that a person or a corporation may be fined $5,000 for a misdemeanor based upon the above.

Finally, it is our opinion that since the statute on tampering with odometer, KRS 190.260 et seq., is civil in nature, the provision of KRS 190.270(4) which provides that the revocation and suspension schedule shall be retroactive to offenses committed as of July 1, 1976, is not violative of the ex post facto prohibitions of the Kentucky and United States Constitutions.

Please feel free to contact us if you have any further questions.

Sincerely,

STEVEN L. BESHEAR
ATTORNEY GENERAL

William L. Davis

By: William L. Davis
Assistant Attorney General

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ATTORNEY GENERAL'S
OFFICE

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Rq. 83-31

City of Auburn
CITY HALL
AUBURN, KENTUCKY 42206
TELEPHONE 502-542-4149

November 29, 1982

Honorable: Steven L. Beshear
Attorney General
Attorney General's Office
Frankfort, Ky. 40601

Hon: Beshear,

If a subject was charged with Wanton endangerment in the first degree, a Class D-felony, does District Court have jurisdiction in this case? On felony cases do they have to go through District Court before they can go to the grand jury? If someone is indicted on a felony charge by a grand jury, can it be turn back to District Court because the defendant was not tried in District Court first?

Sincerely,

Bobby E. Miller, Chief of Police
Auburn Police Department

BEM/bm
cc

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

January 20, 1983

CAPITOL BUILDING
FRANKFORT 40601

Mr. Bobby E. Miller
Chief of Police, City of Auburn
P. O. Box 465
Auburn, Kentucky 42206

OAG83 31

Dear Chief Miller:

This is in response to your letter of November 29, 1982, in which you stated the following:

> If a subject was charged with Wanton endangerment in the first degree, a Class D-felony, does District Court have jurisdiction in this case? On felony cases do they have to go through District Court before they can go to the grand jury? If someone is indicted on a felony charge by a grand jury, can it be turned back to District Court because the defendant was not tried in District Court first?

KRS 24A.110 states the following:

> (1) The district court shall have exclusive jurisdiction to make final disposition of all criminal matters, including violations of county, urban-county, or city ordinances or codes, except:
>
> (a) Offenses denominated by statute as felonies or capital offenses; and
>
> (b) Offenses punishable by death or imprisonment in the penitentiary.

> (2) The district court has exclusive jurisdiction to make a final disposition of any charge or a public offense denominated as a misdemeanor or violation, except where the charge is joined with an indictment for a felony, and all violations of county, urban-county, or city ordinances and, prior to trial, to commit the defendant to jail or hold him to bail or other form of pretrial release.
>
> (3) The district court has, concurrent with circuit court, jurisdiction to examine any charge of a public offense denominated as a felony or capital offense or which may be punished by death or imprisonment in the penitentiary and to commit the defendant to jail or hold him to bail or other form of pretrial release.
>
> (4) The district court may, upon motion and for good cause shown, reduce a charge of a felony to a misdemeanor in accordance with the Rules of Criminal Procedure. (Emphasis added.)

Also, the Kentucky Rules of Criminal Procedure (hereinafter RCr) were amended by Kentucky Supreme Court Order 81-5, effective September 1, 1981. RCr 3.07 states:

> When a person is brought or appears before a judge having authority to try the offense charged, the judge shall proceed in accordance with Chapters VI-XIII of these Rules. If the judge does not have authority to try the offense charged but does have venue to hold a preliminary hearing, he shall proceed in accordance with the remainder of Chapter III. A defendant who has not been indicted is entitled to a preliminary hearing, unless waived, when charged with an offense requiring an

indictment pursuant to Section 12 of the Kentucky Constitution. If the judge does not have authority to try the case or venue to hold the preliminary hearing, he shall order the defendant to be taken before the proper court for further proceedings and may release him on personal recognizance or admit him to bail for his appearance before that court, if the offense is bailable, or commit him to jail to await trial or preliminary hearing. (Emphasis added.)

And RCr 3.10 states:

* * *

(2) If the defendant does not waive the preliminary hearing, such hearing shall be held within a reasonable time but no later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary hearing shall not be held if the defendant is indicted before the date set for the hearing. In the event the preliminary hearing is not held within the above time period, the defendant shall be discharged from custody, and he shall thereafter be proceeded against on that charge by indictment only. Unless the defendant consents to an extension, time limits may be extended by the court only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

(3) Notwithstanding waiver of the preliminary hearing, at any time before the defendant has been indicted the attorney for the Commonwealth shall, upon demand, be entitled to a preliminary hearing for the purpose of examining witnesses. The defendant may cross-examine the witnesses offered by the Commonwealth. (Emphasis added.)

Further, the Kentucky appellate courts have held that no fundamental rights are denied by the failure to hold a post-indictment preliminary hearing. Edwards v. Commonwealth, Ky., 500 S.W.2d 396 (1973); King v. Venters, Ky., 595 S.W.2d 714 (1980). In King v. Venters, supra, the Kentucky Supreme Court stated:

> The purpose of a preliminary hearing, or "examining trial," in this state--and its only purpose--is to determine whether there is sufficient evidence to justify detaining the defendant in jail or under bond until the grand jury has an opportunity to act on the charges. No law has been enacted and no constitutional amendment has been adopted that requires an indictment to be founded on probable cause. As a matter of fact, there is no principle under which the grand jury is bound to give any consideration whatever to the showing made in an examining trial. It may rest its conclusions entirely upon evidence independently brought before it.
>
> The ultimate stage of a criminal proceeding designed for the purpose of testing the evidence is the trial on the merits. We do not consider that the fundamental "rights" of a defendant demand a series of mini-trials to be hurdled by the prosecuting authorities before gaining entrance to the main ring. . . . (Ibid. at 714.)
>
> If we did not say it clearly enough in Edwards v. Commonwealth, Ky., 500 S.W.2d 396, 398 (1973), we say it again now, that a preliminary hearing, examining trial, or any other "probable cause" inquiry, is not pre-requisite to the consideration of a charge by the grand jury or to the validity of an indictment returned pursuant to a "direct

> submission." Nor can the validity of any indictment, in this state at least, be successfully attacked upon the ground of insufficient evidence. (Ibid. at 715.)

Additionally, the Kentucky Court of Appeals stated the following in Commonwealth v. Hamblem, Ky.App., 628 S.W.2d 345 (1981):

> This appeal involves a question that has not previously been determined by our Court; that is, whether the issuance of an indictment on a felony charge places sole jurisdiction in the circuit court, thereby terminating jurisdiction in the district court. (Ibid. at 345.)
>
> Therefore, we hold that once the indictment issued, the district court no longer had power to make a final disposition of the case. See, Collins v. Swenson, 443 F.2d 329 (Eighth Circuit, 1971). (Ibid. at 346.)

Based upon the foregoing authorities, it is our opinion that the district court has concurrent jurisdiction with the circuit court to examine a charge of first degree wanton endangerment, a felony; that felony cases do not have to go through district court before they are presented to the grand jury; and that once a person is indicted on a felony charge by a grand jury, the case cannot be sent back to the district court since the district court no longer has jurisdiction in the case.

Please feel free to contact us if you have further questions.

Sincerely,

STEVEN L. BESHEAR
ATTORNEY GENERAL

William L. Davis

By: William L. Davis
Assistant Attorney General

Rq. 83-70 for log

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ATTORNEY GENERAL'S OFFICE

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January 11, 1983

Hon. Charles W. Runyan
Deputy Attorney General
Attorney General's Office
Capitol
Frankfort, Kentucky 40601

ASSIGNED
JAN 14 1983

Dear Mr. Runyan:

My names is Marilyn M. Roberts, and I am the Official Court Reporter for the 41st Judicial District of Kentucky, composed of Clay, Jackson and Leslie counties. I have been having some problems with a statement for a transcript in a pauper case in Jackson County. The State Local Finance office evidently says that the County does not have to pay for this although KRS 31.200 says exactly the opposite. I have been advised to write your office for an opinion on this matter.

The Administrative Office of the Courts pays for all appeals on pauper cases, but it has always been the rule in the fifteen years that I have been the Court Reporter that the county in which the pauper's case is tried and in which he resides in liable for a transcript of a mis-trial or something of that nature in pauper cases.

Your response to this matter will be greatly appreciated. The case in question in Jackson County was a murder case, and the transcript was of a mis-trial. The style was Commonwealth of Kentucky versus Fred and Carolyn Himes.

Several years ago in Clay County there was a similar problem with only one case, Commonwealth of Kentucky versus Calvin Ray Smith, which resulted in a mis-trial, and the attorney from the Office of Public Advocacy took this matter to the Supreme Court insisting that he was entitled to the transcript and they said that the county was responsible, and that bill was paid. This is the only other problem of this nature I have had on pauper transcripts.

Sincerely,

Marilyn M. Roberts

Marilyn M. Roberts
Official Court Reporter
244 Wayne Street
Manchester, KY. 40962
Phone: 606-598-6536(home) or 606-598-8131(office)

Ky. 83-70③

NOTICE

Please take notice that the foregoing Response To Petition For Writ Of Mandamus will be filed with the Clerk of the Court of Appeals of Kentucky, 403 Wapping Street, Frankfort, Kentucky 40601, on this the 26th day of October, 1979, to be considered at the convenience of the Court.

Ellen Liebman
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response To Petition For Writ Of Mandamus has been mailed to the following: Hon. Clay M. Bishop, Judge, Clay Circuit Court, Clay County Courthouse, Manchester, Kentucky 40962 and Hon. Peter D. Kunen, Assistant Public Advocate, Post Office Office Box 277, London, Kentucky 40741, Counsel for Petitioner, on this the 26th day of October, 1979.

Ellen Liebman
Assistant Attorney General

Ky. 83-70 ©

Commonwealth Of Kentucky

Court Of Appeals

NO. 79-CA-1640-OA

CALVIN RAY SMITH — PETITIONER

v. ORIGINAL ACTION REGARDING
CLAY CIRCUIT COURT

CLAY M. BISHOP
JUDGE, CLAY CIRCUIT COURT — RESPONDENT

* * * * * * * * * * * * * * * * * * * *

ORDER GRANTING WRIT OF MANDAMUS

BEFORE: HAYES, CHIEF JUDGE, GANT and HOWARD, JUDGES

Petitioner has filed a petition for writ of mandamus directing the Clay Circuit Court to order the official court reporter to prepare a transcript of his previous trial, which ended in a mistrial, prior to his being retried.

This Court previously entered an order staying the trial set for October 22, 1979, pending the consideration of the mandamus action.

The Court having considered the petition for writ of mandamus, and the response from the Commonwealth having concurred in petitioner's request, and the Court being otherwise sufficiently advised, it is ORDERED that the petition for writ of mandamus is GRANTED.

It is further ORDERED that the Clay Circuit Court order the official court reporter to prepare the transcript of the

Pg. 83-70(5)

petitioner's prior mistrial, to be prepared at the expense of the Clay County Fiscal Court.

It is further ORDERED that the stay previously entered by this Court shall remain in effect until such time as the said transcript has been prepared.

Petitioner's motion for oral argument is DENIED as moot.

ENTERED: November 12, 1979

CHIEF JUDGE, COURT OF APPEALS

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

February 14, 1983

CAPITOL BUILDING
FRANKFORT 40601

Ms. Marilyn M. Roberts
Official Court Reporter
244 Wayne Street
Manchester, Kentucky 40962

OAG83 70

Dear Ms. Roberts:

This is in response to your letter of January 11, in which you stated the following:

> My name is Marilyn M. Roberts, and I am the Official Court Reporter for the 41st Judicial District of Kentucky, composed of Clay, Jackson and Leslie counties. I have been having some problems with a statement for a transcript in a pauper case in Jackson County. The State Local Finance office evidently says that the County does not have to pay for this although KRS 31.200 says exactly the opposite. I have been advised to write your office for an opinion on this matter.
>
> The Administrative Office of the Courts pays for all appeals on pauper cases, but it has always been the rule in the fifteen years that I have been the Court Reporter that the county in which the pauper's case is tried and in which he resides is liable for a transcript of a mis-trial or something of that nature in pauper cases.
>
> Your response to this matter will be greatly appreciated. The case in question in Jackson County was a murder case, and the transcript was of a mis-trial. The style was Commonwealth of Kentucky versus Fred and Carolyn Himes.

> Several years ago in Clay County there was a similar problem with only one case, Commonwealth of Kentucky versus Calvin Ray Smith, which resulted in a mis-trial, and the attorney for the Office of Public Advocacy took this matter to the Supreme Court insisting that he was entitled to the transcript and they said that the county was responsible, and that bill was paid. This is the only other problem of this nature I have had on pauper transcripts.

As you know, an indigent defendant is entitled to a transcript of a mistrial to prepare for a new trial unless there is some equivalent alternative available. Britt v. North Carolina, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); Simmons v. Commonwealth, Ky.App., 576 S.W.2d 253 (1978). Thus, we must assume that there is no other equivalent alternative available in the instant case.

Further, it must be noted that KRS 31.200 states the following:

> 31.200. Expenses chargeable to county and to public advocate.--(1) Subject to KRS 31.190, any direct expense, including the cost of a transcript or bystander's bill or exceptions or other substitute for a transcript that is necessarily incurred in representing a needy person under this chapter, is a charge against the county on behalf of which the service is performed.
> (2) If two (2) or more counties jointly establish an office for public advocacy, the expenses not otherwise allocable among the participating counties under subsection (1) shall be allocated, unless the counties otherwise agree, on the basis of population according to the most recent decennial census.
> (3) Expenses incurred in the representation of needy persons confined in a state correctional institution shall be borne by the state office for public advocacy. [Emphasis added].

And, the Court in Calvin Ray Smith v. Clay M. Bishop, Judge Clay Circuit Court, Ky.App., File No. 79-CA-1640-MR on November 12, 1979, issued an order granting mandamus. In its order, the Court stated the following:

> It is further ORDERED that the Clay Circuit Court order the official court reporter to prepare the transcript of the petitioner's prior mistrial, to be prepared at the expense of the Clay County Fiscal Court.
>
> It is further ORDERED that the stay previously entered by this Court shall remain in effect until such time as the said transcript has been prepared.

Based upon the foregoing authorities, it is our opinion that the Jackson County Fiscal Court is responsible for paying the official court reporter for preparing the transcript of the mistrial and not the Administrative Office of the Courts.

Please feel free to contact this office if we may be of further assistance.

Sincerely,

STEVEN L. BESHEAR
ATTORNEY GENERAL

William L. Davis

WILLIAM L. DAVIS
ASSISTANT ATTORNEY GENERAL

WLD/sd

Rq. 83-81 0 3120

DEPARTMENT OF THE ARMY
HEADQUARTERS US ARMY ARMOR CENTER AND FORT KNOX
FORT KNOX, KENTUCKY 40121

November 23, 1982

RECEIVED
Dec 13 11 30 AM '82
ATTORNEY GENERAL'S
OFFICE

Honorable Steven L. Beshear
Attorney General of the Commonwealth of Kentucky
The Capitol
Frankfurt, Kentucky 40601

Dear Mr. Beshear:

To foster a more precise application of Kentucky substantive law on the federal enclave of Fort Knox, Kentucky, under the Assimilative Crime Act, 18 USC 13, this office requests your kind assistance by the publication of an opinion of the Attorney General in response to the question detailed below. The question relates to the applicability, not the assimilability, of KRS 514.070, Theft by failure to make required disposition of property, to the following fact pattern.

A federal supervisory employee is entrusted, in accordance with established Army Regulations, with a substantial quantity of tangible property, e.g. chain saws, hand-tools and similar impliments. The employee, in the normal exercise of his duties, is responsible for the management of an equipment loan operation for use of these impliments by authorized personnel on Fort Knox. During an annual audit of this operation a substantial property deficit was detected. Following investigation by U.S. Army Military Police, a factual determination was made that property of a value in excess of one-thousand dollars was lost as the result of grossly negligent, not criminal, conduct. In response to an alarming increase in the incidence of such losses at Fort Knox, a policy determination was made to consider criminal prosecution of a civilian employee in U.S. Magistrate Court in the most egregious case of such negligent loss.

The question submitted for your consideration has two interdependent components. First, whether "accounts" under KRS 514.070 (3)(b)2 may be construed to include the "property accounts" of the equipment loan operation, mentioned above. If "accounts" may be so construed, may the presumption as to government employees contained in KRS 514.070(3) be interpreted to provide a statutory substitute for the mens rea otherwise necessary for criminal prosecution under KRS 514.070(1)(b)?

This office requests that your advice take the form of published opinion in order that others may benefit from the guidance here requested. Your assistance in this matter is greatly appreciated.

Rq. 83-81©

If question may arise as to the elements of this request or other matters, please contact this office at area code 502, commercial telephone 624-7414/6752.

Sincerely,

John C. Tobin
Captain, Judge Advocate General's Corps
Administrative Law Officer

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

March 17, 1983

CAPITOL BUILDING
FRANKFORT 40601

OAG 83 81

Captain John C. Tobin
Administrative Law Officer /JAGC
HQ U.S. Army Armor Center and Fort Knox
Fort Knox, Kentucky 40121

Dear Captain Tobin:

This is in response to your letter dated November 23, 1982. You stated the following:

> To foster a more precise application of Kentucky substantive law on the federal enclave of Fort Knox, Kentucky, under the Assimilative Crime Act, 18 USC 13, this office requests your kind assistance by the publication of an opinion of the Attorney General in response to the question detailed below. The question relates to the applicability, not the assimilability, of KRS 514.070, Theft by failure to make required disposition of property, to the following fact pattern.
>
> A federal supervisory employee is entrusted, in accordance with established Army Regulations, with a substantial quantity of tangible property, e.g. chain saws, hand-tools and similar impliments [sic]. The employee, in the normal exercise of his duties, is responsible for the management of an equipment loan operation for use of these impliments [sic] by authorized personnel on Fort Knox. During an annual audit of this operation a substantial property deficit was detected. Following investigation by U.S. Army Military Police, a factual determination was made that property of a value in excess of one-thousand dollars was lost as

> the result of grossly negligent, not criminal, conduct. In response to an alarming increase in the incidence of such losses at Fort Knox, a policy determination was made to consider criminal prosecution of a civilian employee in U.S. Magistrate Court in the most egregious case of such negligent loss.
>
> The question submitted for your consideration has two interdependent components. First, whether 'accounts' under KRS 514.070 (3)(b)2 may be construed to include the 'property accounts' of the equipment loan operation, mentioned above. If 'accounts' may be so construed, may the presumption as to government employees contained in KRS 514 .070(3) be interpreted to provide a statutory substitute for the mens rea otherwise necessary for criminal prosecution under KRS 514.070(1)(b)?
>
> This office requests that your advice take the form of published opinion in order that others may benefit from the guidance here requested. Your assistance in this matter is greatly appreciated. [Emphasis added].

In order to adequately answer your first question, it will be necessary to examine from the outset KRS 514.070 and the commentary to said statute. KRS 514.070 states the following:

> (1) A person is guilty of theft by failure to make required disposition of property received when:
>
> (a) He obtains property upon agreement or subject to a known legal obligation to make specified payment or other disposition whether from such property or its proceeds or from his own property to be reserved in equivalent amount; and
>
> (b) He intentionally deals with the property as his own and fails to make the required payment or disposition.

> (2) The provisions of subsection (1) apply notwithstanding that it may be impossible to identify particular property as belonging to the victim at the time of the actor's failure to make the required payment or disposition.
> (3) An officer or employe of the government or of a financial institution is presumed:
> (a) To know any legal obligation relevant to his criminal liability under this section; and
> (b) To have dealt with the property as his own when:
> 1. He fails to account or pay upon lawful demand; or
> 2. An audit reveals a shortage or falsification of accounts.
> (4) Theft by failure to make required disposition of property received is a Class A misdemeanor unless the value of the property is $100 or more, in which case it is a Class D felony. (Enact. Acts 1974, ch. 406, § 123.)

The official Commentary (1974) to the above statute states as follows:

> This section does not materially change pre-existing law. KRS 434.020 related to misapplication of moneys, bonds, notes and other property of a state or political subdivision by the custodian, and KRS 434.030 covered embezzlement of property entrusted to a person for delivery. Both statutes are included within the coverage of this section. [Emphasis added].

Based upon the foregoing authorities, it is our opinion that "accounts" under KRS 514.070 (3)(b)(2) include the "property accounts" of the equipment loan operation mentioned above.

Directing our attention to your second question, it will be necessary for us to examine a few basic principles before providing an answer. It has been stated that the essential evil or guilty intent may ordinarily be inferred by the

jury from the commission of the act charged. However, when a specific intent is an element of crime then the intent must be proved. In other words, where a statute denounces the doing of an act as criminal, the law imputes criminal intent from the doing of the act; but where it denounces its wilful doing, a specific wrongful intent must be shown. 29 AM.JUR.2d Evidence § 204, p. 258.

Moreover, mens rea has been defined as a criminal intent; wilfullness. Black's Law Dictionary (Fifth Edition 1979).

And, it must be kept in mind that a presumption may be indulged only so long as there is no substantial evidence to the contrary for when such evidence is offered the presumption disappears and issues must be decided on evidence. Carroll v. Carroll, Ky., 251 S.W.2d 989 (1952). In other words, a presumption is an assumption made by the law that a strong inference of fact is prima facie correct, and will therefore sustain the burden of evidence, until conflicting facts on the point are shown. Where such evidence is introduced, the presumption is functus officio and drops out of sight. 31A C.J.S. Evidence § 117, pp. 210-211. Compare: Wells v. Commowealth, Ky., 561 S.W.2d 85 (1978), which was cited with approval in Commonwealth v. Miller, Ky., 575 S.W.2d 467, 468 (1978). In Wells, the court stated the following:

> Wells complains of a part of the court's instructions on the receiving stolen property counts. The court instructed the jury on the rebuttable presumption of knowledge, embodied in KRS 514.110(2), that arises from the possession of recently stolen moveable property. To so instruct was prejudicially erroneous. Reversal of these convictions, and a new trial of these counts are required.
>
> When the court tells the jury what presumption arises from certain stated facts, it invades the province of the jury. Tines v. Commonwealth, Ky., 77 S.W. 363 (1903). This rule applies to the statutory evidentiary presumption of guilty knowledge which arises

> from the possession of recently stolen moveable property. Jones v. Commonwealth, 291 Ky. 719, 165 S.W.2d 566 (1942); Botnick v. Commonwealth, 266 Ky. 419, 99 S.W.2d 188 (1936). The arguments of the Commonwealth do not persuade us to either abandon or modify this rule.

Furthermore, KRS 501.050 states:

> A person may be guilty of an offense without having one of the culpable mental states defined in KRS 501.020 only when:
> (1) The offense is a violation or a misdemeanor as defined in KRS 508.080 and no particular culpable mental state is included within the definition of the offense; or
> (2) The offense is defined by a statute other than this Penal Code and the statute clearly indicates a legislative purpose to impose absolute liability for the conduct described.

The Commentary to this section also states:

> COMMENTARY (1974)
>
> The purpose of KRS 501.050 is to impose tight restrictions upon the imposition of criminal sanctions for conduct unaccompanied by a culpable mental state. Insofar as offenses defined in this code are concerned, such sanctions are permissible only for those classified as 'violations,' a term used to designate offenses for which no imprisonment is imposed, and those classified as misdemeanors. For offenses defined outside this code, criminal liability in the absence of a culpable mental state is permissible if a legislative intent to impose such liability clearly appears. Allowance for absolute liability under these limited circumstances is justified because of the

> difficulty of proving culpability for certain classes of offenses. A broader allowance cannot be justified, and this section intends to express a judgment to that effect through a general policy adverse to the use of the strict liability doctrine.
>
> Relationship to Pre-existing Law: The existence of absolute liability as a basis of criminality under pre-existing law cannot be questioned. Duncan v. Commonwealth, 158 S.W.2d 396 (1942). In applying this doctrine, Kentucky courts, like those of most other jurisdictions, have experienced only one major problem: When should statutory offenses not expressly requiring a culpable mental state be construed to impose absolute liability? For offenses defined by this code, KRS 501.050 eliminates this problem. If the offense in question is a violation or a misdemeanor, and no culpable mental state is provided in its definition, it is one of 'absolute liability.' Otherwise, it is one of 'mental culpability.' For offenses defined by other Kentucky statutes, KRS 501 .050 alleviates the problem by indicating a clear preference for offenses of 'mental culpability' over offenses of 'absolute liability.'

Also, KRS 501.020 defines intentionally and states that this definition applies throughout the Kentucky Penal Code.

Therefore, it is our opinion that the presumption as to government employees contained in KRS 514.070(3) is only a rebuttable presumption and not a statutory substitute for the mens rea stated in KRS 514.070(1)(b). In other words, employees of the government are presumed to know the relevant legal obligations as they relate to imposition of criminal liability. Further a government employee is presumed to have dealt with the property as his own, if upon lawful demand, he fails to account or pay, or if a shortage or falsification of accounts is revealed by an audit. Thus, these rebuttable presumptions do not

83-81

create strict liability and cannot be used as a statutory substitution for the mens rea requirement in said statute.

We hope that the Office of the Attorney General has been of some assistance in this matter.

Sincerely,

STEVEN L. BESHEAR
ATTORNEY GENERAL

William L. Davis
Assistant Attorney General

WLD/sd

Ag. 83-136 © 3165

DEPARTMENT OF THE ARMY
HEADQUARTERS US ARMY ARMOR CENTER AND FORT KNOX
FORT KNOX, KENTUCKY 40121

December 16, 1982

RECEIVED
DEC 21 11 25 AM '82
ATTORNEY GENERAL'S OFFICE

Office of the Staff Judge Advocate

Mr. Steven L. Beshear
Office of the Attorney General
Capitol Building
Frankfort, Kentucky 40601

Dear Mr. Beshear:

I received your Opinion of the Attorney General 591 pertaining to authority for commissioned officers to notarize the signatures of civilian dependents of military members. Your formal opinion has prompted this further inquiry.

Frequently, the Legal Assistance Division of the office is called upon to prepare wills and powers of attorney and to notarize the signatures on these and other documents. The office does employ a full-time civilian notary public. Unfortunately, it is not always possible for her to be present. In her absence, a commissioned officer is ordinarily required to act as a notary pursuant to the authority of 10 USC Section 936. Many dependent spouses have found it a substantial inconvenience to appear at the office only to be told a military officer was the only person then available to notarize and he could not notarize for them. My principal concern is to make sure such inconveniences are minimized and all possible services provided. There is a very significant need, in view of the service nature of our Legal Assistance Division, to provide notary services if at all possible.

In reviewing the Kentucky Revised Statutes, there is an apparent inconsistency between the authority of a commissioned officer to notarize for a civilian spouse of a service member depending upon where the act of notarization occurs, inside or outside the state. Implicit in your opinion that commissioned officers can not perform notarial acts for spouses or dependents within the limits of the Commonwealth is the apparent authority to validly do such acts outside of Kentucky. Indeed, KRS Section 423.110 (4) seems to extend such authority to non-resident commissioned officers to notarize for dependents:

> "...Notarial acts may be performed outside this state for use in this state with the same effect as if performed by a notary public of this state by the following persons...

Rq. 83-136(2)

(4) A commissioned officer in active service with the armed forces of the United States and any other person authorized by regulation of the armed forces to perform notarial acts if the notarial act is performed for one of the following or his dependents: ...a member of the armed forces of the United States..." (emphasis added)

Certainly, the statutes were not meant to legalize a notarial act by a commissioned officer in another state and at the same time implicitly invalidate a similar act within the state. If that is in actuality the correct law, then this further question arises: For this limited purpose of notarizing for civilian dependents, shouldn't the federal military reservation of Fort Knox be considered "outside the Commonwealth?" If it is, then under the authority of KRS Section 423.110 (4), commissioned officers would have the authority on this installation that I am sure was intended. In addition, such statutory construction resolves a significant need. The Legal Assistance Division would be able to provide the notary service to civilian dependents in those instances when the civilian notary is unavailable.

I hope you can concur in my interpretation of these statutes and approve a necessary practice. In the event your conclusion is contrary, please suggest a means whereby non-resident commissioned officers can qualify to notarize in the special case of a civilian dependent of a service member on Fort Knox proper.

Sincerely,

Richard K. Dahlinger

Richard K. Dahlinger
Colonel, Judge Advocate General's Corps
Staff Judge Advocate

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

May 3, 1983

CAPITOL BUILDING
FRANKFORT 40601

Colonel Richard K. Dahlinger
Staff Judge Advocate
HQ U.S. Army Armor Center
and Fort Knox
Fort Knox, Kentucky 40121

OAG83 136

Dear Colonel Dahlinger:

This is in response to your letter dated December 16, 1982. You stated that OAG 82-591 prompted further inquiry. In OAG 82-591, we stated that Kentucky law does not permit commissioned officers or enlisted personnel to take acknowledgments or perform other notarial acts for spouses or other dependents of military personnel who are within the limits of Kentucky based upon the language of KRS 423.110(4). However, we also stated that commissioned officers and enlisted personnel may be appointed as notaries public by the Kentucky Secretary of State if they meet the requirements of KRS 423.010. In regard to the above, you stated, "For this limited purpose of notarizing for civilian dependents, shouldn't the federal military reservation of Fort Knox be considered 'outside the Commonwealth.'"

KRS 3.030 states the following:

> 3.030. Jurisdiction over military post (Fort Knox) at West Point ceded.--Kentucky cedes to the United States all the rights and jurisdiction which she now possesses over the land and premises in the vicinity of West Point, Kentucky, conveyed or to be conveyed to the United States for the purpose of establishing a permanent camp of instruction and military post, so long as the same shall remain the property of the United States. (2376d-1.)

Residents of areas subject to exclusive federal jurisdiction have in the past been considered to be "stateless" in many respects. Frequently, they were denied the right to vote in state elections, receive relief benefits for the poor, hold local office, attend state schools, use state courts when domicile in the state was required by jurisdiction, and other state

benefits. These areas were not considered part of the state. The current judicial trend grants federal enclave residents rights that are based on state laws. The current cases attempt to accommodate the federal and state interests within the federal enclave and in so doing suggest that state jurisdiction continues within the area provided the exercise of that jurisdiction does not involve interference with Federal activities. In other words, the "fiction of a state within a state" has been laid to rest and cannot be resurrected. Howard v. Commissioners of the Sinking Fund of the City of Louisville, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953); First Hardin National Bank v. Fort Knox National Bank, 361 F.2d 276 (6th Cir. 1966); Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978); Evans v. Cornman, 389 U.S 419, 90 S.Ct. 1752, 26 L.Ed.2d 270 (1970). As a matter of fact, the Sixth Circuit in First Hardin National Bank, supra, stated the following:

> The principle has been well established that a military reservation within a state remains a geographical part of the city, county and state of which it was part at the time of acquisition by the United States. In Howard v. Commissioners of the Sinking Fund of the City of Louisville, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953), the City of Louisville, Kentucky annexed certain federally owned land on which a naval ordnance plant was located. The Appellants in that case argued that the City could not annex this federal area because it had ceased to be a part of Kentucky when the United States assumed exclusive jurisdiction over it. In holding that the geographical structure of Kentucky remained the same, the Supreme Court stated:
>
> > "When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be a part of Kentucky. The geographical structure of Kentucky remained the same. In rearranging the structural divisions of the Commonwealth, in accordance with the state law, the area

became a part of the City of Louisville, just as it remained a part of the County of Jefferson and the Commonwealth of Kentucky."

In the instant case, upon conveyance to the United States, the State of Kentucky relinquished its jurisdiction over the area conveyed. Under the terms of the conveyance, the loss of jurisdiction was not absolute. The interest of Kentucky in the land conveyed became dormant, and will remain dormant so long as the land conveyed remains the property of the United States. When the United States ceases to own the land conveyed, jurisdicton will be reactivated in the State of Kentucky. The geographical structure of the State of Kentucky not only remains the same, but the State retains a dormant jurisdiction over the land.

Furthermore, a careful analysis of KRS 423.110 reveals that the exercise of the state jurisdiction in the area of notarial acts as to Fort Knox does not involve interference with federal activities.

Based upon the foregoing, it is our opinion that Fort Knox did not cease to be part of Kentucky simply because the United States assumed exclusive jurisdiction. Thus, it must be considered within the limits of Kentucky for at least the limited purpose of applying KRS 423.110(4).

Please do not hesitate to contact us if we may be of further assistance.

Sincerely,

STEVEN L. BESHEAR
ATTORNEY GENERAL

William L. Davis

WILLIAM L. DAVIS
ASSISTANT ATTORNEY GENERAL

WLD/sd

Rq. 83-146@ 2976

HUTCHISON & HODGES
ATTORNEYS AT LAW
108 NORTH REED STREET
COLUMBIA, KENTUCKY 42728
TELEPHONE 502 - 384-3336

ROBERT H. HUTCHISON JR.
JAMES TERRY HODGES

PHONE 502 - 384-3336

November 19, 1982

RECEIVED
Nov 22 1 37 PM '82
ATTORNEY GENERAL'S OFFICE

Office of the Attorney-General
Capitol Building
Frankfort, Kentucky 40601

Re: K.R.S. 439.265

Dear Sir:

K.R.S. 439.265 provides that ". . . any circuit court may, upon motion of the defendant made not earlier than thirty (30) days nor later than ninety (90) days after the defendant has been delivered to the keeper of the institution to which he has been sentenced, suspend the further execution of the sentence and place the defendant on probation upon such terms as the court determines."

Following the November term of the Adair Circuit Court, prisoners have been lodged in the Adair County Jail awaiting transfer to the State Reformatory at Lagrange, Kentucky. The Adair County Jailer has been notified that it may take from sixteen (16) to eighteen (18) weeks before the reformatory will be ready to receive the prisoners.

The question has arisen as to when the 30 to 90 days referred to in the statute herein cited begins to run. The statute does state that it is after the defendant has been delivered to the keeper of the institution to which he has been sentenced; would delivery to the jailer for awaiting transfer meet the language of the statute, or must the prisoners be further penalized because of the institution's crowded conditions and delayed transfer instructions?

Your interpretation of the statute as it pertains to this circumstance would be greatly appreciated.

Very truly yours,

James Terry Hodges
Attorney at Law

JTH/sc

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

May 4, 1983

CAPITOL BUILDING
FRANKFORT 40601

OAG83 146

Hon. James Terry Hodges
Hutchison & Hodges
Attorneys at Law
108 North Reed Street
Columbia, Kentucky 42728

Dear Mr. Hodges:

In your letter to this office dated November 19, 1982, you stated the following:

> KRS 439.265 provides that ". . . any circuit court may, upon motion of the defendant made not earlier than thirty (30) days nor later than ninety (90) days after the defendant has been delivered to the keeper of the institution to which he has been sentenced, suspend the further execution of the sentence and place the defendant on probation upon such terms as the court determines."
>
> Following the November term of the Adair Circuit Court, prisoners have been lodged in the Adair County Jail awaiting transfer to the State Reformatory at Lagrange, Kentucky. The Adair County Jailer has been notified that it may take from sixteen (16) to eighteen (18) weeks before the reformatory will be ready to receive the prisoners.
>
> The question has arisen as to when the 30 to 90 days referred to in the statute herein cited begins to run. The statute does state that it is after the defendant has been delivered to the keeper of the

> institution to which he has been sentenced; would delivery to the jailer for awaiting transfer meet the language of the statute, or must the prisoners be further penalized because of the institution's crowded conditions and delayed transfer instructions?
>
> Your interpretation of the statute as it pertains to this circumstance would be greatly appreciated.

It will be necessary to note from the outset three basic principles of statutory construction before responding to your inquiries. First, the cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect. Fiscal Court Commissioners of Jefferson County v. Jefferson County Judge/Executive, Ky.App., 614 S.W.2d 954, 957 (1981). Second, the primary rule in determining the intent of the legislature is to ascertain the intention from the words employed in enacting the statute. Kentucky Association of Chiropractors, Inc. v. Jefferson County Medical Society, Ky., 549 S.W.2d 817, 821 (1977). Third, a statute must not be interpreted so as to bring about an unreasonable result. George v. Alcoholic Beverage Control Board, Ky., 421 S.W.2d 569, 571 (1967); Pewee Valley Fire Protection Dist. v. South Oldham Fire Protection District, Ky.App., 570 S.W.2d 290, 292 (1978).

Further, it will be necessary to note the language of KRS 431.060 and KRS 431.130. KRS 431.060 states that:

> Offenses are either felonies or misdemeanors. Offenses punishable with death or confinement in the penitentiary are felonies. All other offenses, whether at common law or made so by statute, are misdemeanors. [Emphasis added].

And, KRS 431.130 states that:

> Prisoners sentenced to punishment by confinement in the penitentiary shall be kept at hard labor. If the punishment is imprisonment in the jail of the county, the imprisonment shall be close confinement in the jail of the county where the trial was held, unless otherwise provided. . . . [Emphasis added].

Turning our attention to the matter you submitted, we must read KRS 439.265 in conjunction with KRS 439.267. A close examination of these two statutes reveals that the General Assembly intended for KRS 439.265 only to apply to felony convictions and for KRS 439.267 only to apply to misdemeanor convictions. Also, compare Commonwealth v. Cornelius, Ky.App., 606 S.W.2d 172 (1980).

Although the Kentucky appellate courts have not directly addressed the matter you submitted, they have indirectly addressed said matter. Commonwealth Ex Rel. Hancock v. Melton, Ky., 510 S.W.2d 250 (1974); Commonwealth Ex Rel. Molloy v. Meade, Ky.App., 554 S.W.2d 399 (1977). In Melton, supra at 252, the Court stated:

> On the question of jurisdiction we think it is clear that the order was not within the authority granted by the statute. Under the plain words of the statute a motion by the defendant must be filed within the thirty-day period that commences thirty days after delivery of the defendant to the penitentiary, and the court must enter its ruling not later than seventy days after the motion is filed. . . . [Emphasis added].

Also, the Court in Meade, supra at 401, stated:

> It is the opinion of this Court that the case of Commonwealth of Kentucky ex rel. Hancock v. Melton, Ky., 510 S.W.2d 250 is dispositive of the issue here. The headnotes in that case recite:
>
> > Probation order under statute authorizing probation on court's own motion must be entered within the 30-day period commencing 30 days after delivery of defendant to penitentiary.
>
> This opinion is not intended in any way to infringe upon the powers of the court to retain control of their judgments for the period provided by the Rules of Civil Procedure. Had the respondent placed the defendants herein in the Fayette County Jail for a period not to exceed ten days, it would

clearly be within his power to subsequently probate said defendants. However, once the defendants are committed to the penal institution, it is our opinion that Ky.Rev.Stat. 439.265 is controlling and must be complied with. [Emphasis added].

Based upon the foregoing authorities, it is our opinion that the General Assembly in KRS 439.265 intended for shock probation to be available only to those convicted felons who have served at least thirty (30) days in a state prison and not a county jail. This becomes even more so when you consider the theory behind KRS 439.265. Of course, the theory is that some convicts who have committed serious crimes (usually young first offenders), after confinement in a state prison for thirty (30) days, will be so shocked by the confinement in the prison at hard labor that they won't get into trouble again.

However, it is also our opinion that if a circuit court placed a convicted felon in the county jail, it would clearly be within the circuit court's power to subsequently probate that convicted felon within ten (10) days.

Please feel free to contact us if we may be of further assistance.

Sincerely,

STEVEN L. BESHEAR
ATTORNEY GENERAL

William L. Davis

WILLIAM L. DAVIS
ASSISTANT ATTORNEY GENERAL

WLD/sd

OAG 83-147

494

KENTUCKY BOARD FOR
LICENSING HEARING AID DEALERS

Post Office Box 456, Frankfort, Kentucky 40602 Telephone (502) 564-3296

RECEIVED
FEB 24 12 45 PM '83
ATTORNEY GENERAL'S
OFFICE

February 23, 1983

Steven L. Beshear, Attorney General
Attorney General's Office
Capitol Building
Frankfort, KY 40601

Dear Honorable Beshear:

KRS 334.140 defines the terms of members of the Kentucky Board for Licensing Hearing Aid Dealers, and states, in part"...No member shall serve more than one (1) consecutive term."

If a member resigns or is removed during the term of his appointment, and another person is appointed to fill the remainder of that term, at its conclusion may this person then be appointed to a full term?

Respectfully Yours,

David Nicholas for

ROBERT C. STOCKLER
Chairman

DN:dlg

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

May 4, 1983

CAPITOL BUILDING
FRANKFORT 40601

Mr. Robert C. Stockler
Chairman
Kentucky Board for Licensing
Hearing Aid Dealers
Berry Hill Annex
U.S. 60 West
Frankfort, Kentucky 40602

OAG83 147

Dear Mr. Stockler:

This will acknowledge receipt of your letter to this Office dated February 23, 1983. In said letter, you submitted the following:

> KRS 334.140 defines the terms of members of the Kentucky Board for Licensing Hearing Aid Dealers, and states, in part, ". . . no member shall serve more than one (1) consecutive term."
>
> If a member resigns or is removed during the term of his appointment, and another person is appointed to fill the remainder of that term, at its conclusion may this person then be appointed to a full term?

It will be necessary to note from the outset four basic principles of statutory construction before responding to your inquiry. First, the process of interpreting statutory language requires courts to be guided by the intention of the legislature. That intent is to be drawn from the meaning expressed or reasonably implied in the language used. Commonwealth v. Carroll County Fiscal Court, Ky.App., 633 S.W.2d 720, 722 (1982). Second, when a statute defines words used therein we look to the legislative definition rather than the dictionaries or common usage. George Wohrley, Inc. v. Commonwealth, Department of Revenue, Ky., 495 S.W.2d 173, 174 (1973). Third, a statute must not be interpreted so as to bring about an unreasonable result. George v. Alcoholic Beverage Control Board, Ky., 421 S.W.2d 569, 571 (1967); Pewee Valley Fire Protection Dist. v. South Oldham Fire Protection Dist., Ky.App., 570 S.W.2d 290, 292 (1978).

Fourth, it is a primary rule of statutory construction that the enumeration of particular things excludes the idea of something else not mentioned. Smith v. Wedding, Ky., 303 S.W.2d 322, 323 (1957).

Turning our attention to the matter you submitted, we must first examine the entire language of KRS 334.140. KRS 334 .140 states:

> State board of hearing aid dealers. -
> (1) There is hereby created the "Kentucky Board for Licensing Hearing Aid Dealers."
> (2) The board shall be composed of nine (9) members who shall be appointed by the governor within thirty (30) days after June 16, 1972. Terms of office shall be for four (4) years. Appointments shall be scheduled so that two (2) appointments shall be made every year, except the fourth year when one (1) appointment shall be made. To accomplish this, initial appointments shall be made on the following schedule: Two (2) for one (1) year; three (3) for two (2) years; two (2) for three (3) years; and two (2) for four (4) years. All terms shall expire on July 31 of designated year. Each member shall serve for the term of his appointment and until his successor has been appointed and qualified. In the event of a vacancy on the board, a new member shall be appointed to serve out the unexpired term. No member shall serve more than one (1) consecutive term. The governor may remove a member only for cause.
> (3) Five (5) members shall be hearing aid dealers. The initial appointees shall have at least five (5) years' experience as dealers. Those appointed thereafter shall be licensed under this chapter. The governor shall consider nominations from the Kentucky Hearing Aid Dealers Association. There shall not be two (2) members from the same place of business serving on the board at the same time.

(4) One (1) member shall be a physician licensed to practice medicine in Kentucky and specializing in otology and otolaryngology.
(5) One (1) member shall be an audiologist holding at least a master's degree from a recognized college or university having the certification of clinical competence in audiology from the American Speech and Hearing Association.
(6) One (1) member shall be a citizen at large who is not associated with or financially interested in the practice or business regulated.
(7) One (1) member shall be the secretary for human resources or his representative.
(8) Five (5) members of the nine (9) members of the board, including either the physician or the audiologist, when properly convened, may conduct the business of the board." [Emphasis added].

Although the phrase "term of office" is not among the words defined in KRS 334.010, the highest court in this state on several occasions has defined the phrase "term of office". In Schardein v. Harrison, 230 Ky. 1, 18 S.W.2d 316, 317 (1929); McGinnis v. Cossar, 230 Ky. 213, 18 S.W.2d 988 (1929); Mullins v. Jones, 290 Ky. 796, 162 S.W.2d 761, 763 (1942); and Gerald v. Judd, Ky., 331 S.W.2d 119, 120 (1959), this language was found to be acceptable:

"Term" is thus identified and defined as a certain and fixed period of four years. It commences when the mayor is elected and inducted into office and ends at the end of the four years for which he was elected. One or several persons may discharge the duties of the office during this period, but the term is not divided into smaller terms by the number of persons who may fill the office. It remains one and indivisible, and term follows term in successive cycles of four years each. Nor does it die with the incumbent. On the contrary,

> if the incumbent or the one elected to the office shall resign, refuse to qualify, or be impeached or removed from office, the term remains unbroken until the recurring election for that office. When so considered, the words "No mayor, after the expiration of the term of office to which he has been elected . . . shall be eligible for the succeeding term," evidently refer to a term of four years, and mean that a mayor who is elected to a full term may not be re-elected within eight years.

Furthermore, KRS 334.140(2) states that "Terms of office shall be four (4) years."

Based upon the foregoing authorities, it is our opinion that the words "No member shall serve more than one (1) consecutive term" evidently refer to a term of four (4) years, and mean that a member who is appointed to a full term may not be re-appointed within eight (8) years.

Therefore, we are of the opinion that a new member who has been appointed to serve out an unexpired term due to a vacancy on the board can be appointed to serve a full term immediately after he has completed the unexpired term of another.

We hope that the Office of the Attorney General has been of some assistance in this matter.

Sincerely,

STEVEN L. BESHEAR
ATTORNEY GENERAL

William L. Davis

WILLIAM L. DAVIS
ASSISTANT ATTORNEY GENERAL

WLD/sd

Rq. 83-482 D 1900

Lexington
Fayette
Urban
County
Government

HUMAN RIGHTS COMMISSION

RECEIVED
SEP 13
ATTORNEY
OFF

Robert R. Jefferson, Chairperson
Charles Powell, Vice Chairperson
David Bolotin, Treasurer
Laleah Logan, Secretary

Anthea Boarman, Executive Director

September 9, 1983

Hon. William A. Davis
Assistant Attorney General
for Civil Rights
Office of the Attorney General
Capitol Building
Frankfort, Kentucky 40601

Dear Mr. Davis:

On behalf of the Lexington-Fayette Urban County Human Rights Commission, I am writing to request a formal Opinion of the Attorney General concerning the applicability of Goldy v. Kentucky Personnel Board (Franklin Circuit Court Civil Action No. 81-CI-1294) to investigations conducted by this Commission pursuant to the provisions of K.R.S. 344.300 et.seq.

This Commission has received requests from the Cabinet for Human Resources, to refer all charges against it to the Equal Employment Opportunity Commission, based on the argument that is set out in the attached letter dated March 8, 1983 from Honorable William K. Moore, Office of the Counsel for C.H.R. This Commission not only is a deferral agency for the Equal Employment Opportunity Commission under Section 706 of Title VII of the Civil Rights Act of 1964 as amended [42 U.S.C. 2000(e)]; but also participates in a Work Sharing Agreement with the Equal Employment Opportunity Commission dated September 30, 1982, a copy of which Agreement is attached for your information. Under the terms of Contract No. 3/5010/0031 between the Commission and the Equal Employment Opportunity Commission, the Commission processes those charges filed first with it, then dual-filed with the Equal Employment Opportunity Commission and deferred for local processing.

It has been the position of the Commission that Goldy v. Kentucky Personnel Board is inapplicable not only because the Commission is not bound by decisions of the Circuit Courts outside the county in which it sits; but also because Goldy was a case filed under K.R.S. 344.450, allowing original suits against employers in addition to other statutory remedies.

207 North Upper Street Lexington, Kentucky 40507 (606) 252-4931

Rq. 83-482 (2)

Those are clearly adversarial proceedings, and not in the nature of objective investigations. It would appear that a Commission could, in effect, apply the "adverse inference" rule to all respondents who fail to cooperate in investigations; thus finding cause to believe the allegations of complaints, however, it has been our practice to allow Respondents, whether the State and its political subdivisions or private employers (a-Ll of whom are defined as "employers" under state statue and local ordinances) to put forth full answers to charges.

Although the processes of the Human Rights Commission are not in question here, I set them out to indicate the concern of the Commission that matters under investigation not be treated as adversarial processes. Mediation and conciliation are the statutorily preferred measures for resolution of Fair Employment Practices complaints, and the agency does not wish to engage in adversarial proceedings with other public agencies for reasons related to the common welfare to do so would thwart the statutory intent not only of the state statues but of Title VII of the Civil Rights Act of 1964 as well.

Very truly yours,

Anthea M. Boarman

Anthea M. Boarman,
Executive Director

cc: Hon. Ray Terry, Regional Counsel
Equal Employment Opportunity Commission
Memphis District Office

AMB:krf

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

David L. Armstrong
ATTORNEY GENERAL

CAPITOL BUILDING
FRANKFORT 40601

December 20, 1983

Honorable Anthea M. Boarman
Executive Director
Lexington-Fayette Urban
County Government
Human Rights Commission
207 North Upper Street
Lexington, Kentucky 40507

OAG83 482

Dear Ms. Boarman:

This will serve to acknowledge receipt of your letter to this Office requesting a formal opinion of the Attorney General. By a telephone conversation with you, you amended your written request for opinion by restricting the question to the following:

> Whether the Fayette Urban County Government Human Rights Commission (hereinafter the Commission) is fully authorized to handle complaints against the state or its agencies when a state merit employee is involved?

First, it must be noted that KRS Chapter 18 was repealed, reenacted and amended as KRS Chapter 18A effective July 15, 1982. Second, it must be noted that KRS Chapter 18 and KRS Chapter 18A contain no reference to any restrictions as to the bringing of a Civil Rights Complaint before the Commission.

Furthermore, civil rights are a group attended to citizenship. They belong to all persons and are not necessarily akin to rights which may emanate from the Merit Act of covered employees. (Compare McNeal v. Armour and Company, Ky.App., __ S.W.2d ____, 30 K.L.S. 12, p. 1 (October 13, 1983).

Additionally, we must point out two important cardinal rules of statutory construction. A specific statute controls over a general statute. Hollis v. Commonwealth, Ky., 625 S.W.2d 61, 64 (1983); Handley v. Commonwealth, Ky.App., 653 S.W.2d 165, 166 (1983). And, there is a presumption that the legislature

was cognizant of preexisting statutes at the time they enacted the later statute. Fiscal Court Commissioners of Jefferson County v. Jefferson County Judge/Executive, Ky.App., 614 S.W.2d 954, 958 (1981). In Manning v. Kentucky Bd. of Dentistry, Ky. App., 657 S.W.2d 584 (1983), the Court stated the following:

> The Court's function in the interpretation of statutes is to construe the language so as to give effect to the intent of the legislature. Grinstead v. Kirby, Ky., 110 S.W. 247 (1908); Fiscal Court Commissioners of Jefferson County v. Jefferson County Judge/Executive, Ky.App., 614 S.W.2d 954 (1981). Where words in a statute are clear and unambiguous and express the legislative intent, there is no room for construction and the statute must be accepted as it is written. Griffin v. City of Bowling Green, Ky., 458 S.W.2d 456 (1970); Barnett v. Commonwealth, Ky.App., 566 S.W.2d 794 (1978). It is presumed that the legislature is acquainted with the law on the subjects on which it legislates and is informed of previous legislation and construction that it has previously received. Where it has made no exception to the positive terms of a statute, the presumption is that it intended to make none, and it is not the province of a court to introduce an exception by construction. Hawley Coal Company v. Bruce, Ky., 252 Ky. 455, 67 S.W.2d 703 (1934); Button v. Hikes, Ky., 296 Ky. 163, 176 S.W.2d 112 (1943); Commonwealth v. Boarman, Ky.App., 610 S.w.2d 922 (1980).

KRS Chapter 344 (The Kentucky Civil Rights Act) was enacted in 1966 and amended in 1980. KRS Chapter 18 (The Merit Act) was enacted in 1960, repealed and reenacted and amended as KRS Chapter 18A in 1982. The general purpose of KRS Chapter 18A is to establish for the state a system of personnel administration based on merit principles. On the other hand, the Kentucky Civil Rights Act was enacted with the specific purpose of preserving the federal civil rights law by providing for its execution within the state and of safeguarding all individuals within the state from discrimination because of race, color, religion,

national origin, sex, and age. KRS 18A .010; KRS 344.020; KRS 344.040; Kentucky Commission on Human Rights vs. Kentucky Department for Human Resources, Ky.App., 564 S.W.2d 38 (1978); Kentucky Commission on Human Rights vs. Fraser, Ky., 625 S.W.2d 852 (1981).

Moreover, in OAG 75-669 we concluded that the Kentucky Civil Rights Act clearly authorizes the Commission to exercise jurisdiction over complaints alleging that an agency or instrumentality of the Commonwealth of Kentucky has committed or is committing civil rights violations in Fayette County. KRS 344 .010; KRS 344.310.

In light of the above, it is the Opinion of this Office that the Commission is fully authorized to handle complaints against the state or its agencies concerning civil rights violations in Fayette County even though the complaining employee is a Merit employee of the state or its agencies.

Sincerely,

DAVID L. ARMSTRONG
ATTORNEY GENERAL

William L. Davis

WILLIAM L. DAVIS
ASSISTANT ATTORNEY GENERAL

WLD/sd

RQ. 84-33 @ 52

Mitch McConnell, County Judge/Executive
JEFFERSON COUNTY DEPARTMENT FOR HUMAN SERVICES
Jeanne B. Frank, A.C.S.W., Secretary

Division for Community Services
Joseph P. Tolan, A.C.S.W., Deputy Secretary
Office for the Aging
208 South Fifth Street · Louisville, Kentucky 40202 · 502/581-6400

RECEIVED
JAN 9 11 AM '84
ATTORNEY GENERAL'S OFFICE

January 4, 1984

RECEIVED
JAN 9 9 11 AM '84
ATTORNEY GENERAL'S OFFICE

The Honorable William L. Davis
Office of the Attorney General
Room 28
Kentucky State Capitol
Frankfort, KY 40601

Dear Mr. Davis:

As we described on the telephone, our office acts for Jefferson County, in those interests that concern the elderly. Our staff, carrying on this role, discuss bills, issues, and concerns with various members of the State legislature. The issues we address are public ones, such as nursing home regulations, legislation relating to public utilities, living wills, legislation permitting programs for home repair for the elderly, and so forth.

We do not, at any time, involve ourselves in any issues relating to any private pecuniary interests.

We are, of course, on a salary and the only reimbursement involved would be for our costs of travel to Frankfort.

Since we limit our interests to public concerns, we request exemption from requirement to register as lobbyists.

Very truly yours,

Charles Dibowski

Charles Dibowski, Coordinator
Jefferson County Office for the Aging

CD/pfm

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DAVID L. ARMSTRONG
ATTORNEY GENERAL

January 19, 1984

CAPITOL BUILDING
FRANKFORT 40601

Mr. Charles Dibowski
Coordinator
Jefferson County Office
for the Aging
208 South Fifth Street
Louisville, Kentucky 40202

OAG84 33

Dear Mr. Dibowski:

This will serve to acknowledge receipt of your letter to this Office dated January 4, 1984. In your letter, you stated the following:

> As we described on the telephone, our office acts for Jefferson County, in those interests that concern the elderly. Our staff, carrying on this role, discuss bills, issues, and concerns with various members of the State legislature. The issues we address are public ones, such as nursing home regulations, legislation relating to public utilities, living wills, legislation permitting programs for home repair for the elderly, and so forth.
>
> We do not, at any time, involve ourselves in any issues relating to any private pecuniary interests.
>
> We are, of course, on a salary and the only reimbursement involved would be for our costs of travel to Frankfort.
>
> Since we limit our interests to public concerns, we request exemption from requirement to register as lobbyists.

Before addressing the specific issue of exemption, it behooves us to discuss some important principles.

First, lobbying has been defined as the process of soliciting members of the legislative body for the purpose of influencing their vote. 51 AM. Jur. 2d, Lobbying § 1.

However, the General Assembly has enacted laws which determine when a person must register as a lobbyist in Kentucky. A person must register as a lobbyist if he or she is both "employed" and acting with respect to "private pecuniary interests." KRS 6.250 et seq. A person is considered to be "employed" if he or she receives a salary or other compensation for his or her lobbying activities. For example, if a person is a full-time employee of a company, he or she is "employed" if the person continues to receive his or her salary while acting as a lobbyist. He or she is also considered "employed" even if the person is just merely reimbursed for expenses incurred while lobbying. OAG 76-7.

Further, a person must also be acting with respect to private pecuniary (monetary) interests before he or she is required to register as a lobbyist. In other words, a person who is interested only in legislation which affects the public is not a lobbyist within the meaning of KRS 6.250 since no private pecuniary interests are involved. OAG 74-342.

Based upon the foregoing, your staff would not be considered as lobbyists under Kentucky law since they are interested only in legislation which affects the public as a whole even though they are employed.

Therefore, it is our Opinion that your staff are exempt from registering as lobbyists with our Office. Nevertheless, we must note that if your staff do register even though they do so only as a precaution, the ministerial functions required by the pertinent regulations and statutes pertaining to lobbyists necessitate that they be treated as any other person who registered. OAG 76-7.

84-33

We hope that the Office of the Attorney General has been of some assistance in this matter. Also, we are enclosing copies of OAG 74-342 and OAG 76-7 for your convenience.

Sincerely,

DAVID L. ARMSTRONG
ATTORNEY GENERAL

William L. Davis

WILLIAM L. DAVIS
ASSISTANT ATTORNEY GENERAL

WLD/sd

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FEB 14 12 55 PM '84
ATTORNEY GENERAL'S OFFICE

Rq. 84-145 ①

Needs to be assigned to Bill Davis for opinion.

302

CLARENCE HOWARD
Clerk, Perry County Court
Phone 436-4614 or 436-2812
HAZARD, KENTUCKY 41701
February 13, 1984

rec. 2/14/84 cp.

Mr. William L. Davis
Assistant Attorney General
Room 28
Capitol Building
Frankfort, Kentucky

ASSIGNED
Feb 16 1984
ATTORNEY GENERALS OFFICE

Dear Mr. Davis:

I am writing to you concerning our phone conversation on the 13 day February about granting Veterans copies without charge. The field rep for Perry County keeps asking us to give these persons free copies of anything they bring into our office. According to our County Attorney, we are to grant them free copies of any document that is on file in our immediate office but, not copies of medical records and ect. that they bring in to us. Please send me a letter so I can present it to the field representative the next time this situation arises.

Please send your reply to my attention; Mrs. Doris Fugate

Clarence Howard, Clerk
Doris Fugate
Deputy Clerk

KRS 355.380

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DAVID L. ARMSTRONG
ATTORNEY GENERAL

April 19, 1984

CAPITOL BUILDING
FRANKFORT 40601

OAG 84 145

Mrs. Doris Fugate
Deputy Clerk
Office of the County Court Clerk
Perry County Courthouse
Hazard, Kentucky 41701

Dear Mrs. Fugate:

This is in response to your letter of February 13, 1984 in which you stated the following:

> I am writing to you concerning our phone conversation on the 13 [sic] day February about granting Veterans copies without charge. The field rep for Perry County keeps asking us to give these persons free copies of anything they bring into our office. According to our County Attorney, we are to grant them free copies of any document that is on file in our immediate office but, not copies of medical records and ect. [sic] that they bring in to us. Please send me a letter so I can present it to the field representative the next time this situation arises.
>
> Please send your reply to my attention; [sic] Mrs. Doris Fugate.

The matter you submitted is addressed in KRS 388.330. KRS 388.330 is titled "Certified Copies of Records To Be Furnished Veterans Administration Without Charge." And, KRS 388 .330 states the following:

> Whenever a copy of any public record is required by the veterans administration to be used in determining the eligibility of any person to participate in benefits made available by such veterans administration,

the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the authorized representative of such veterans administration with a certified copy of such record.

History: 1942 c25, § 14, Eff. 6-1-42.

A careful reading of KRS 388.330 requires the Clerk of Perry County Court to provide copies of records maintained in his custody free of charge to a person only if the records are needed in connection with a claim filed with the Veterans Administration. Otherwise, the person must not only pay for copies of records in custody of the Clerk of Perry County Court which are not needed in connection with a claim filed with the Veterans Administration, but also must pay for copies of records he brings to the Clerk solely for the purpose of copying regardless of whether they are needed in connection with a claim filed with the Veterans Administration. Also, this Office first adhered to this position in 1955 OAG 37,722 and sees no reason to retreat from it.

Sincerely,

DAVID L. ARMSTRONG
ATTORNEY GENERAL

William L. Davis

WILLIAM L. DAVIS
ASSISTANT ATTORNEY GENERAL

WLD/sd

cc: Honorable William Engle, III

Rq. 84-2950 1036

U.S. Department of Justice

Office of Justice Assistance, Research, and Statistics

Washington, D.C. 20531

June 4, 1984

Honorable David L. Armstrong
Attorney General of Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601

Dear Mr. Attorney General:

This office is currently reviewing its files concerning certifications under Executive Order 11755, employment of non-Federal inmates in the performance of Federal contracts (copy attached).

This office last contacted your office on March 19, 1981 conerning the State of Kentucky's conformity with the Order. Your office's March 30, 1981 reply indicated that Kentucky State law precludes the utilization of State prisoners for employment by Federal contractors (copy attached).

Our present inquiry is whether this situation has changed through subsequent litigation, laws, or constitutional amendments. If so, please notify this office so that Kentucky may be considered for certification under the Executive Order.

If we can be of any assistance in the interim, please feel free to contact this office.

Sincerely,

John J. Wilson
Associate General Counsel
Office of General Counsel

cc: State Department of Corrections
Kentucky Department of Justice

Rg. 84-295(2)

Presidential Documents

Title 3—The President

EXECUTIVE ORDER 11755

Relating To Prison Labor

The development of the occupational and educational skills of prison inmates is essential to their rehabilitation and to their ability to make an effective return to free society. Meaningful employment serves to develop those skills. It is also true, however, that care must be exercised to avoid either the exploitation of convict labor or any unfair competition between convict labor and free labor in the production of goods and services.

Under section 4082 of title 18 of the United States Code, the Attorney General is empowered to authorize Federal prisoners to work at paid employment in the community during their terms of imprisonment under conditions that protect against both the exploitation of convict labor and unfair competition with free labor.

Several states and other jurisdictions have similar laws or regulations under which individuals confined for violations of the laws of those places may be authorized to work at paid employment in the community.

Executive Order No. 325A, which was originally issued by President Theodore Roosevelt in 1905, prohibits the employment, in the performance of Federal contracts, of any person who is serving a sentence of imprisonment at hard labor imposed by a court of a State, territory, or municipality.

I have now determined that Executive Order No. 325A should be replaced with a new Executive order which would permit the employment of non-Federal prison inmates in the performance of Federal contracts under terms and conditions that are comparable to those now applicable to inmates of Federal prisons.

NOW, THEREFORE, pursuant to the authority vested in me as President of the United States, it is hereby ordered as follows:

SECTION 1. (a) All contracts involving the use of appropriated funds which shall hereafter be entered into by any department or agency of the executive branch for performance in any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands shall, unless otherwise provided by law, contain a stipulation forbidding in the performance of such contracts, the employment of persons undergoing sentences of imprisonment which have been imposed by any court of a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands. This limitation, however, shall not prohibit the employment by

Rq. 84-295 (8)

a contractor in the performance of such contracts of persons on parole or probation to work at paid employment during the term of their sentence or persons who have been pardoned or who have served their terms. Nor shall it prohibit the employment by a contractor in the performance of such contracts of persons confined for violation of the laws of any of the States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, or the Trust Territory of the Pacific Islands who are authorized to work at paid employment in the community under the laws of such jurisdiction, if

(1)(A) The worker is paid or is in an approved work training program on a voluntary basis;

(B) Representatives of local union central bodies or similar labor union organizations have been consulted;

(C) Such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

(D) The rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the locality in which the work is being performed; and

(2) The Attorney General has certified that the work-release laws or regulations of the jurisdiction involved are in conformity with the requirements of this order.

(b) After notice and opportunity for hearing, the Attorney General shall revoke any such certification under section 1(a)(2) if he finds that the work-release program of the jurisdiction involved is not being conducted in conformity with the requirements of this order or with its intent or purposes.

SEC. 2. The Federal Procurement Regulations, the Armed Services Procurement Regulations, and to the extent necessary, any supplemental or comparable regulations issued by any agency of the executive branch shall be revised to reflect the policy prescribed by this order.

SEC. 3. Executive Order No. 325A is hereby superseded.

SEC. 4. This order shall be effective as of January 1, 1974.

Richard Nixon

THE WHITE HOUSE,
December 29, 1973.

[FR Doc.74-350 Filed 1-2-74;10:15 am]

DOJ-1974-03

Rq.84-295(A)

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
ATTORNEY GENERAL

CAPITOL BUILDING
FRANKFORT 40601

March 30, 1981

John J. Wilson
Acting General Counsel
Office of General Counsel
U.S. Department of Justice
Washington, D.C. 20531

Dear Mr. Wilson:

This is in reply to your letter dated March 19, 1981, in which you stated that your office was currently reviewing its files concerning certification under Executive Order 11755, employment of non-federal inmates in the performance of federal contracts.

As noted in your letter, this office informed you in August 1974, that the holding in Commonwealth, ex rel. Hancock v. Holmes, Ky., 509 S.W.2d 258 (1974), (copy attached), precludes the utilization of state prisoners for employment by federal contractors. This is to inform you that this remains the state of the law in Kentucky. Accordingly, the requirements of the Executive Order cannot be complied with by the State of Kentucky.

Very truly yours,

STEVEN L. BESHEAR
ATTORNEY GENERAL

Eileen Walsh

Eileen Walsh
Assistant Attorney General

EW:ar
Attachment

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

DAVID L. ARMSTRONG
ATTORNEY GENERAL

CAPITOL BUILDING
FRANKFORT 40601

August 13, 1984

Honorable John J. Wilson
Associate General Counsel
Office of General Counsel
U.S. Department of Justice
Washington, D.C. 20531

OAG 84 295

Dear Mr. Wilson:

This is in reply to your letter dated June 4, 1984, in which you inquire as to whether Kentucky law still precludes the utilization of State prisoners for employment by Federal contractors as stated in our letter of March 19, 1981. It is our opinion that Kentucky law still precludes the utilization of State prisoners for employment by Federal contractors. Our opinion is based upon five grounds:

First, Commonwealth ex rel Hancock v. Holmes, Ky., 509 S.W.2d 258, 260-261 (1974), states the following:

> KRS 439.600(4) deals with employment other than that allowed by section 253. The constitutional debates clearly reveal that section 253 was designed to prohibit the Commonwealth, any division thereof, or any private enterprise from working convicts outside the prison walls, with the exceptions we will mention. In George v. Lillard, supra, we said,
>
> > " * * * The purpose of the enactment of that section of the constitution was to prevent the working of convicts by the state outside of the prison walls. That was the evil intended to be remedied by the prohibition contained in the section. * * *"

Originally the Commonwealth was authorized to use convict labor outside the prison walls on its public works, or during a time of pestilence, or if prison buildings were destroyed and confinement could not be continued. Harris v. Commonwealth, 23 K.L.R. 775, 64 S.W. 434 (1901); Reliance Mfg. Co. v. Board of Prison Commissioners, 161 Ky. 135, 170 S.W. 941 (1914). Harris stated,

> "* * * While the section of the constitution quoted requires the convicts to be worked within the walls of the penitentiary, they are not required to be always kept within the walls, and may be sent out under guard at times. * * *"

Our decision in Reliance Mfg. Co. v. Board of Prison Commissioners, supra, said,

> "* * * that convicts shall be confined at labor within the walls of the penitentiaries, and the General Assembly shall not have the power to authorize their employment elsewhere, except upon the public works of the commonwealth, or in case of pestilence or the destruction of the prison building. * * *"

The 1915 amendment to section 253 of the Constitution liberalized its provisions by authorizing the use of prison labor to "* * * aid the counties for road and bridge purposes, * * *."

[2] Appellees argue that this is a meritorious and progressive program, therefore we should not strike it down. It is not for this court to judge the benefits, if any, to

be derived from legislation, but rather to determine whether it is prohibited by the Constitution. Viewing it in that light, we hold that employment of prisoners convicted of a felony, except as authorized by section 253 as amended, is impermissible and that KRS 439.600(4) as drawn and implemented by KRS 439.620 is contrary to that section of the Constitution.

Second, Preston v. Ford, 378 F.Supp. 729-730 (E.D. Ky. 1974), states the following:

> John Brenton Preston seeks to proceed in forma pauperis in this civil rights "class" action attacking Kentucky provisions foreclosing a "work release program" for inmates. The plaintiff, who is confined in a minimum security institution, argues that the wages paid incarcerated convicts are "inherently unfair", and that the unavailability of work release programs violates the Equal Protection Clause of the Fourteenth Amendment. The complaint seeks the convocation of a three-judge court to declare the unconstitutionality of Section 253 of the Kentucky Constitution and K.R.S. 197.070-197.200.
>
> Section 253 of the Kentucky Constitution provides:
>
> > "Persons convicted of felony and sentenced to confinement in the penitentiary shall be confined at labor within the walls of the penitentiary; and the general assembly shall not have the power to authorize employment of convicts elsewhere, except upon the public

> works of the Commonwealth of Kentucky, or when, during pestilence or in case of the destruction of the prison buildings, they can not be confined in the penitentiary."

This section was amended in 1915 to permit the use of convicts for work on public roads, bridges, and farms. The assailed legislation generally requires prison labor and industrial training; regulates the terms of work and compensation; forbids the employment of inmates outside the penitentiary for non-public projects; and specifies convicts ineligible for external work.

[1-4] The labor of a convict belongs to the state, which may within limitations specify the conditions of employment. Sims v. Parke Davis & Co., E.D. Mich., 334 F.Supp. 774, 791 (1971), aff'd 6th Cir., 453 F.2d 1259 (1971), cert. denied 405 U.S. 978, 92 S.Ct. 1196, 31 L.Ed.2d 254 (1972); see also Green v. United States, D.C. Cir., 481 F.2d 1140 (1973); Breece v. Swenson, W.D.Mo., 332 F.Supp. 837, 843 (1971); Mercer v. United States Med. Center for Fed. Pris., W.D.Mo., 312 F.Supp. 1077, 1079-1080 (1970). Whatever the rehabilitative effects of a work release program, see Commonwealth ex rel. Hancock v. Holmes, Ky., 509 S.W.2d 258 (1974), a state convict enjoys no federally protected right to outside employment. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). These diminished liberties include participation in a particular prison job, Banks v. Norton, D.Conn., 346 F.Supp. 917, 921 (1972), or payment for work while

incarcerated. Marchese v. United States, 453 F.2d 1268, 1271, 197 Ct.Cl. 102 (1972); Sigler v. Lowrie, 8th Cir., 404 F.2d 659, 661 (1968), cert. denied 395 U.S. 940, 89 S.Ct. 2010, 23 L.Ed.2d 456 (1969); Shively v. White, W.D.Va., 351 F.Supp. 191, 195 (1972). Thus, in Wagner v. Holmes, E.D.Ky., 361 F.Supp. 895, 897 (1973), this court upheld a Kentucky statute denying outside release to specified classes of prisoners:

> "One of the rights sacrificed as inconsistent with institutional security is that of freely leaving the prison to engage in outside employment. Participation in an outside work release program is in this respect a privilege, not a right; it is comparable to the educational opportunities extended to certain inmates: a benefit which may be withdrawn without constitutional proscription."

See Shaw v. Beto, S.C.Texas, 318 F.Supp. 1215 (1970); United States v. Pate, N.D.Ill., 229 F.Supp. 818 (1964).

Third, the former KRS 439.600(4) stated the following:

> (4) To do work at paid employment in the community on a voluntary basis returning to the institution or to the facility at night. A prisoner authorized to work at paid employment in the community under the provisions of this subsection shall surrender to the commissioner of corrections, or his designate, his earnings, less standard payroll deductions required by law. After deducting from the earnings of each prisoner an amount determined to be the cost of the prisoner's keep and confinement, which sum shall be deposited in the Kentucky state

treasury as trust and agency receipts at the place of confinement of the inmate, the commissioner of corrections, or his designate shall:

(a) Allow the prisoner to draw from the balance a reasonable sum to cover his incidental expenses;

(b) Retain to the prisoner's credit such amount as deemed necessary to accumulate a reasonable sum to be paid to him on his release from prison;

(c) Cause to be paid any additional balance as is needed for the support of the prisoner's dependents. (Enact. Acts 1972, ch. 293, § 3.)

The former KRS 439.600(4) is embodied in the present KRS 439.600(1)(d) and (2) which state the following:

. . . (d) To do work at paid employment in the community on a voluntary basis returning to the institution or to the facility at night.

(2) A prisoner authorized to work at paid employment in the community under the provision of this subsection shall surrender to the secretary of the corrections cabinet, or his designate, his earnings, less standard payroll deductions required by law. After deducting from the earning of each prisoner an amount determined to be the cost of the prisoner's keep and confinement, which sum shall be deposited in the Kentucky state treasury as trust and agency receipts at the place of confinement of the inmate, the secretary of the corrections cabinet, or his designate shall:

(a) Allow the prisoner to draw from the balance a reasonable sum to cover his incidental expenses;

(b) Retain to the prisoner's credit such amount as deemed necessary to accumulate a reasonable sum to be paid to him on his release from prison;

(c) Cause to be paid any additional balance as is needed for the support of the prisoner's dependents. (Enact. Acts 1972, ch. 293, § 3; 1982, ch. 344, § 55, effective July 15, 1982.)

And, the former KRS 439.620 is basically identical to the present KRS 439.620.

Fourth, Commonwealth Ex Rel Hancock v. Holmes, supra, has not been overruled by the Kentucky Supreme Court. Also, Preston v. Ford, supra, has not been overruled by the United States Court of Appeals For The Sixth Circuit or the United States Supreme Court.

Fifth, Kentucky Constitution Section 253 has not been amended since the decisions of Commonwealth Ex Rel Hancock v. Holmes, supra, and Preston v. Ford, supra, were handed down.

Based upon the foregoing, it is our Opinion that the present KRS 439.600(1)(d) and (2) as drawn and implemented by KRS 439.620 are contrary to Kentucky Constitution Section 253. Thus, Kentucky State prisoners still cannot be utilized for employment by Federal contractors.

We hope that the Office of the Attorney General has been of some assistance.

Sincerely,

DAVID L. ARMSTRONG
ATTORNEY GENERAL

William L. Davis

WILLIAM L. DAVIS
ASSISTANT ATTORNEY GENERAL

WLD/sd